In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1469

MICHAEL P. LAVELLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of having dealt in stolen securities which had moved in interstate commerce and of having knowingly defrauded the United States by causing stolen treasury bills to be presented for payment, in violation of 18 U.S.C. 2314 and 2315, and of having conspired to commit those substantive offenses in violation of 18 U.S.C. 371. He was sentenced to concurrent terms of two years' imprisonment on each count and fined $10,000 on the conspiracy count.[1]

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[1] Seymour Thaler, one of petitioner's co-defendants, has petitioned for certiorari in No. 72-1575.

Petitioner's sole contention—that the inaccurate alternative conspiracy theory submitted to the jury permitted it to convict him of conspiracy without finding the requisite elements of the offense—is fully answered in Judge Friendly's exhaustive opinion (Pet. App. A19-A24), on which we rely. As that opinion points out (Pet. App. A-23), even if the jury followed the inaccurate instruction in reaching the verdict, they nevertheless must have found every element necessary to sustain the conviction under the proper theory.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1973.

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[2] This case was thus unlike the situation in *Leary* v. *United States*, 395 U.S. 6, relied on by petitioner, in which conviction under the incorrect instructions entailed omission of an element of the offense.